Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–16 OF 2006–1
CLEMENT SKINNER J
15 SEPTEMBER 2006

Civil Procedure — Judgment and orders — Judgment in default — Setting aside — Granted by the lower court — Application made some seven months after receipt of judgment in default — Explanation was due to unforseen circumstances without informing the court what those unforseen circumstances were — No prayers for extensions of time to make applications — Whether judge erred in allowing the application because of merits — Subordinate Courts Rules 1980 O 29 r 14

Civil Procedure — Time — Extension of — Non-compliance of rules of court — Application did not specifically apply for an extension of time — Application was for leave to file the application — Whether could cover extension of time — Subordinate Courts Rules 1980 O 29 r 1

This is the hearing of an appeal brought by the appellant ('plaintiff') in the court below against the decision of the learned sessions court judge who, on 7 April 2006, allowed the first and second respondents' ('defendants') application to set aside an interlocutory judgment that was entered against them in default. The plaintiff (an infant) sued by his father and next friend. On 28 January 2002, the plaintiff was travelling in a motor vehicle driven by his father, when the car was involved in an accident with a lorry owned by the second defendant and driven by the first defendant. The plaintiff sustained bodily injuries as a result of the accident. On 25 November 2004, the plaintiff, through his lawyers, wrote to the defendants demanding the payment of compensation in respect of the injuries he suffered. By the same letter, the insurers of the first defendant's lorry, namely AXA Affin Assurance Bhd ('AXA Affin') were given notice pursuant to s 96(2) of the Road Transport Act 1987 of the plaintiff's intention to commence legal proceedings against their insured. On 10 December 2004, the plaintiff commenced this action at the Sessions Court, Kuching. Both the defendants upon being served with the summons contacted the insurers AXA Affin and was told that they will appoint a solicitor to attend to the matter. The first defendant was contacted by the legal firm of Messrs Tang & Antau Co, informing him that the legal firm had been appointed by the insurers to act on behalf of the defendants. On 1 April 2005, the defendants' lawyers wrote to the plaintiffs advocates informing the latter of the former's appointment to act on behalf of the defendants and to forward all correspondence to them. When the defendants nor their lawyers appeared on the return date fixed for the hearing of the summons, the sessions judge granted interlocutory judgment against the defendants with damages to be assessed on a date to be fixed by the court. Some seven months after

the interlocutory judgment was served on the defendants, the defendants applied to set aside the interlocutory judgment entered against them. The defendants also applied (in their first prayer) that they be granted leave to file an application to set aside the interlocutory judgment entered against them. The plaintiff took two points before the learned sessions judge, namely: (i) that the defendants had not applied to extend the time to file their application to set aside; and (ii) there was no acceptable explanation for the delay in making the application.

Held, allowing the appeal with costs:

(1) The learned sessions judge erred in her finding that even though the defendants' application did not specifically apply for an extension of time to file their application, the first prayer of their application would suffice for that purpose. The defendants had applied for leave to file the application simpliciter, which, means nothing, since the Subordinate Courts Rules 1980 ('SCR') does not require the defendants to obtain any form of leave before they can file an application under O 29 r 14 of the SCR. But if they are out of time in doing so, then they should apply for extension of time to do so which, they clearly did not do. The worthlessness of the plaintiffs first prayer becomes apparent when it is considered that even if the defendants' first prayer was granted in terms, it would still not have the effect of extending time to the defendants to make the application for the simple reason that no extension of time was applied for (see para 9).

(2) The learned sessions judge is correct in her findings and her reasons for rejecting the explanation offered by the defendants. There is a distinct lack of candour on the defendants' part in trying to blame the insurers for appointing the legal firm of Messrs Tang & Antau Co. at the last moment. There can be no truth in this allegation for two reasons: first, Messrs Tang & Antau Co received the insurers' instructions on 4 April 2005 which was four days before the return date fixed for the hearing of the summons; and secondly, no one from Messrs Tang & Antau Co has come forward to say the firm was instructed too late to be able to appear on 8 April 2005 or why they could not do so (see para 17).

(3) The defendants' further lack of candour can be seen from their assertion that the interlocutory judgment was entered against them due to unforseen circumstances. The defendants are not being forthright with the court nor of any assistance to the court when they refuse to inform the court what those unforseen circumstances were. In a case such as this where the defendants are relying on the court to exercise discretion in their favour, they cannot expect a favourable exercise of discretion if they themselves are not candid with the court or are not willing to place all relevant material before the court to assist the court in the exercise of its discretion (see para 18).

(4) Order 62 r 13 of the Rules of the High Court 1980 ('the RHC') is of no assistance to the defendants here nor has it any application to the facts of this case. Order 62 r 13 is meant to apply in a situation where a party has either sued or appeared in person and then appoints a solicitor to act for him and gives notice to the opposite party of such fact, which is not the case here.

The defendants here, never having appeared in person cannot rely on this rule. Accordingly, the service of the interlocutory judgment personally on the defendants was good and effective to inform them of the judgment obtained against them and any application to set aside such judgment would have to be applied for within the time prescribed by O 29 r 14 of the SCR, unless extended by the court, neither of which was done in this case (see para 20).

(5) The learned sessions judge had erred in setting aside the interlocutory judgment for the sole reason that the defendants had a defence on the merits. Once the learned sessions judge had arrived at a finding that the defendants' application was out of time and no acceptable explanation had been given for the delay in making the application, it was not open to her to consider the merits of the application (see *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* [2003] 4 MLJ 647). In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 ML J 223 case it was said that a court 'will not, whenever feasibly, allow a client to suffer for the negligence of his solicitor', the court of appeal did go on to say that 'there are limits to what may be done in the interests of justice' which, as the court of appeal went on to point out, 'is not only for a defaulting defendant: it is for the plaintiff as well'. On the facts and circumstances disclosed to the court, clearly the defendants here were indolent (see paras 22–23).

[Bahasa Malaysia summary

Ini adalah pendengaran rayuan oleh perayu ('plaintif') di mahkamah bawahan terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah pada 7 April 2006, membenarkan permohonan responden pertama dan kedua ('defendan-defendan') untuk mengetepikan penghakiman ingkar interlokutori yang dimasukkan terhadap mereka. Plaintif ('seorang kanak-kanak') menyaman melalui bapa dan sahabat wakilnya. Pada 28 Januari 2002, plaintif di dalam sebuah kenderaan motor yang dipandu oleh bapanya, apabila kereta tersebut terlibat dengan satu kemalangan dengan sebuah lori yang dimiliki oleh defendan kedua dan dipandu oleh defendan pertama. Plaintif mengalami kecederaan tubuh diakibatkan daripada kemalangan tersebut. Pada 25 November 2004, plaintif, melalui peguam mereka, menulis kepada defendan-defendan menuntut bayaran pampasan berhubungan dengan kecederaan yang dialaminya. Melalui surat yang sama, syarikat insurans lori defendan pertama, iaitu AXA Affin Assurance Bhd ('AXA Affin') diberi notis menurut s 96(2) Akta Pengangkutan Jalan 1987 akan niat plaintif-plaintif untuk memulakan tindakan undang-undang terhadap pengambil insurans tersebut. Pada 10 Disember 2004 plaintif memulakan tindakan ini di Mahkamah Sesyen, Kuching. Kedua-dua defendan setelah disampaikan dengan saman telah menghubungi syarikat insurans AXA Affin dan telah diberitahu bahawa mereka akan melantik peguamcara untuk perkara ini. Defendan pertama dihubungi oleh firma peguam Tetuan Tang & Antau Co., yang memaklumkan bahawa mereka telah dilantik oleh syarikat insurans untuk bertindak bagi pihak defendan-defendan. Pada 1 April 2005, peguam defendan-defendan telah menulis kepada peguamcara plaintif memaklumkan kepada peguamcara plaintif bahawa mereka telah dilantik untuk bertindak bagi pihak defendan-defendan dan melanjutkan segala surat menyurat kepada mereka. Apabila defendan-defendan ataupun peguam mereka hadir

pada tarikh yang ditetapkan untuk pendengaran saman, hakim sesyen telah memberikan penghakiman interlokutori terhadap defendan-defendan dengan ganti rugi untuk ditaksirkan pada satu tarikh yang akan ditentukan oleh mahkamah. Lebih kurang tujuh bulan selepas penghakiman interlokutori disampaikan ke atas defendan-defendan, defendan-defendan memohon untuk mengetepikan penghakiman interlokutori yang dimasukkan terhadap mereka. Defendan-defendan juga memohon (dipermohonan pertama) bahawa mereka diberikan kebenaran untuk memfailkan permohonan untuk mengetepikan penghakiman interlokutori yang dimasukkan terhadap mereka. Plaintif berhujah atas dua perkara sebelum hakim mahkamah sesyen yang bijaksana, iaitu: (i) bahawa defendan-defendan tidak memohon untuk melanjutkan masa untuk memfailkan permohonan mereka untuk mengetepikan; dan (ii) tiada penjelasan yang dapat diterima atas kelewatan membuat permohonan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim mahkamah sesyen yang bijaksana telah terkhilaf dalam cariannya bahawa walaupun permohonan defendan-defendan tidak secara spesifik memohon satu lanjutan masa untuk memfailkan permohonan mereka, permohonan pertama permohonan mereka adalah mencukupi untuk tujuan tersebut. Defendan-defendan telah memohon untuk kebenaran memfailkan permohonan simpliciter, yang mana, ia tidak bermaksud apa-apa, oleh kerana Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') tidak memerlukan defendan-defendan mendapatkan sebarang kebenaran sebelum mereka memfailkan satu permohonan di bawah A 29 k 14 KMR. Akan tetapi sekiranya mereka di luar masa berbuat demikian, maka mereka harus memohon satu lanjutan masa untuk berbuat demikian, di mana adalah jelas mereka tidak melakukannya. Permohonan pertama plaintif-plaintif yang tidak bernilai adalah jelas kelihatan di mana walaupun sekiranya permohonan pertama defendan-defendan diberikan, ia masih tidak mempunyai sebarang kesan dalam melanjutkan masa kepada defendan-defendan membuat permohonan tersebut oleh kerana tiada lanjutan masa dipohon (lihat perenggan 9).

(2) Hakim mahkamah sesyen adalah betul dalam dapatan dan alasannya menolak penjelasan yang diberikan oleh defendan-defendan. Defendan-defendan tidak bersikap secara terus terang dalam percubaan mereka menyalahkan syarikat insurans melantik firma guaman Tetuan Tang & Antau Co pada saat yang akhir. Tiada kebenaran dalam pengataan ini atas dua sebab; pertama, Tetuan Tang & Antau Co menerima arahan daripada syarikat insurans pada 4 April 2005 di mana terdapat empat hari sebelum tarikh yang ditetapkan untuk pendengaran saman tersebut; dan keduanya, tiada sesiapapun daripada Tetuan Tang & Antau Co telah hadir untuk menyatakan bahawa firma mereka telah menerima arahan pada saat yang akhir untuk hadir pada 8 April 2005 ataupun kenapa mereka tidak dapat berbuat demikian (lihat perenggan 17).

(3) Sikap defendan-defendan yang tidak berterus terang dapat juga dilihat daripada pengataan mereka bahawa penghakiman interlokutori yang dimasukkan terhadap mereka adalah disebabkan oleh keadaan yang tidak dapat

dijangkakan. Defendan-defendan tidak berterus terang dengan mahkamah ataupun membantu mahkamah apabila mereka enggan memberitahu mahkamah apakah keadaan yang tidak dapat dijangkakan tersebut. Dalam kes sebegini dimana defendan-defendan bergantung pada mahkamah untuk menggunakan budi bicaranya untuk memihak mereka, mereka tidak boleh mengharapkan satu budi bicara yang memihak mereka sekiranya mereka sendiri tidak berterus terang dengan mahkamah atau tidak ingin memberikan kesemua fakta penting kepada mahkamah untuk membantu mahkamah menggunakan budi bicaranya (see para 18).

(4) Aturan 62 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak membantu defendan-defendan di sini ataupun mempunyai sebarang penggunaan terhadap fakta-fakta kes ini. Aturan 62 k 13 adalah untuk situasi di mana satu pihak yang telah saman atau menghadirkan diri dan kemudiannya melantik seorang peguamcara untuk bertindak untuknya dan memberi notis fakta sedemikian kepada pihak bertentangan, di mana ia bukan kes di sini. Defendan-defendan di sini, yang tidak pernah menghadirkan diri tidak boleh bergantung atas kaedah ini. Dengan itu, penyampaian penghakiman interlokutori secara kediri defendan-defendan adalah baik dan berkesan untuk memaklumkan kepada mereka penghakiman telah diperolehi terhadap mereka dan sebarang permohonan untuk mengetepikan penghakiman ini mesti dipohon dalam jangkamasa yang ditetapkan oleh A 29 k 14 KMR, kecuali dilanjutkan oleh mahkamah, kedua-duanya tidak dilakukan di dalam kes ini (lihat perenggan 20).

(5) Hakim mahkamah sesyen yang bijaksana telah terkhilaf dalam mengetepikan penghakiman interlokutori atas sebab tunggal bahawa defendan-defendan mempunyai pembelaan berdasarkan merit. Sebaik sahaja hakim yang bijaksana memutuskan bahawa permohonan defendan-defendan adalah di luar jangkamasa dan tiada penjelasan yang dapat diterima diberikan untuk kelewatan membuat permohonan, adalah tidak terbuka untuknya mempertimbangkan merit permohonan tersebut (lihat *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* [2003] 4 MLJ 647). Dalam kes *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 ML J 223 ia dikatakan bahawa sesebuah mahkamah tidak akan, bila-bila masa ia sesuai, membenarkan seseorang anakguam menderita akibat kecuaian peguamcaranya, mahkamah rayuan juga menyatakan bahawa terdapat had kepada apa yang dapat dilakukan demi kepentingan keadilan dimana seperti yang mahkamah rayuan seterusnya menjelaskan, bukan hanya tuju kepada kesalahan defendan: ia juga bermaksud untuk plaintif. Atas fakta-fakta dan keadaan yang didedahkan kepada mahkamah, adalah jelas bahawa defendan-defendan di sini berat tulang (lihat perenggan 22–23).]

Notes

For cases on extension of time, see 2 *Mallal's Digest* Consolidated Subject Index (4th Ed) paras 6787–6824.

For cases on judgment in default, see 2 *Mallal's Digest* Consolidated Subject Index (4th Ed) paras 3719–3723.

Cases referred to

C Paul D'Cruz v Chow Tai You & Sons Sdn Bhd [1999] 1 MLJ 51 (refd)
Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bh [1996] 1 ML J 223 (refd)
Malayan United Bank Bhd v Mohamed Salleh bin Mohamed Yusoff & Ors [1988] 3 MLJ 165 (refd)
Mokhtar bin Amin v Mohamed Mokhtar bin Omar [2001] 4 MLJ 239 (distd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd [2003] 4 MLJ 647 (folld)
OCBC Bank (M) Bhd & Anor v Livison Sdn Bhd & Ors [2001] 5 MLJ 129 (refd)

Legislation referred to

Road Transport Act 1987 s 96(2)
Rules of the High Court 1980 O 42 r 13, O 62 r 13
Sarawak Advocates' Ordinance (Cap 110) s 9
Subordinate Courts Rules 1980 O 1 r 4, O 29 r 14

Appeal from: Summons No 53–127 of 2004–1 (Sessions Court, Kuching)

Shankar Ram (Thomas Shankar Ram & Co) for the appellant.
Charles Antau (Tang & Antau Co) for the respondents.

Clement Skinner J:

[1] This is the hearing of an appeal brought by the plaintiff in the court below, against the decision of the learned sessions court judge who, on 7 April 2006, allowed the first and second defendant's application to set aside an interlocutory judgment that was entered against them in default. For convenience, I shall continue to refer to the appellant and respondents in this appeal as the plaintiff and defendants respectively.

[2] The brief facts leading up to this appeal are these. The plaintiff (an infant) sues by his father and next friend. On 28 January 2002, the plaintiff was travelling in a motor vehicle driven by his father, when the car was involved in an accident with a lorry owned by the second defendant and driven by the first defendant. The plaintiff sustained bodily injuries as a result of the accident. On 25 November 2004, the plaintiff, through his lawyers, wrote to the defendants demanding the payment of compensation in respect of the injuries he suffered. By the same letter, the insurers of the first defendant's lorry, namely AXA Affin Assurance Bhd ('AXA Affin') were given notice pursuant to s 96(2) of the Road Transport Act 1987 of the plaintiffs intention to commence legal proceedings against their insured.

[3] On 10 December 2004, the plaintiff commenced this action at the Sessions Court, Kuching. The first defendant was personally served with the summons on 12 January 2005 while the second defendant was personally served with the summons on 11 January 2005. According to the affidavit of the first defendant Chan Yam Heng, (affirmed on 5 December 2005 on his own behalf as well as on behalf of the second defendant), upon being served he contacted the insurers AXA Affin and

was told that they will appoint a solicitor to attend to the matter. The first defendant affirmed in the same affidavit that he was contacted by the legal firm of Messrs Tang & Antau Co, informing him that the legal firm had been appointed by the insurers to act on behalf of the defendants. On 1 April 2005, the defendants' lawyers wrote to the plaintiffs advocates informing the latter of the former's appointment to act on behalf of the defendants and to forward all correspondence to them.

[4] When the defendants nor their lawyers appeared on the return date fixed for the hearing of the summons, the sessions judge granted interlocutory judgment against the defendants with damages to be assessed on a date to be fixed by the Court.

[5] The interlocutory judgment was then personally served on first defendant on 10 May 2005, and on the second defendant on 9 May 2005. The court then fixed 15 December 2005 for damages to be assessed. On 9 December 2005, the defendants applied to set aside the interlocutory judgment entered against them. The defendants also applied (in their first prayer) that they 'be granted leave to file an application to set aside the interlocutory judgment entered' against them.

[6] In allowing the application, the learned sessions judge gave written grounds for her decision. A reading of her decision shows:

(a) that she found the interlocutory judgment to be a regular judgment. On the facts before me, I find that she was correct in this part of her decision. Counsel for the defendant also conceded before me that the judgment was a regular judgment;

(b) that by O 29 r 14 of the Subordinate Courts Rules 1980 ('SCR'), an application to set aside a judgment that was entered in default must be made within 30 days of the receipt of the order or judgment to be set aside. The learned sessions judge found that the defendant's application to set aside was made well outside the prescribed period, in that, it was filed some seven months after the interlocutory judgment was served on the defendants.

[7] On this part of the case the plaintiff took two points before the learned sessions judge, namely: (i) that the defendants had not applied to extend the time to file their application to set aside, and (ii) there was no acceptable explanation for the delay in making the application.

[8] With regard to the first point the defendants contended that even though their application did not specifically apply for an extension of time to file their application, the first prayer of their application would suffice for that purpose. The learned sessions judge agreed with the defendants' submission and held:

> Although the application does not specifically contain a prayer for leave to extend the time for the filing of the application, it has nevertheless prayed for leave to file the application, which, if granted by the court, has, in my view, the effect of granting the extension of time to the defendants to file the application.

[9] I find that the learned sessions judge erred in this finding. Her reasoning cannot be supported. The defendants had applied for leave to file the application simpliciter, which, in my view, means nothing, since the SCR does not require the defendants to obtain any form of leave before they can file an application under O 29 r 14 of the SCR. But if they are out of time in doing so, then they should apply for extension of time to do so which, they clearly did not do. The worthlessness of the plaintiffs first prayer becomes apparent when it is considered that even if the defendants' first prayer was granted in terms, it would still not have the effect of extending time to the defendants to make the application for the simple reason that no extension of time was applied for.

[10] With regard to the second point, ie that no reasonable explanation had been offered by the defendants for the delay in making the application, the defendants had offered two explanations before the learned sessions judge for the delay. The first explanation was that upon being served the summons they duly informed their insurers who informed them that a solicitor would be appointed to act for them, following which Messrs Tang & Antau Co advocates contacted the frirst defendant to inform him that they had been appointed by the insurers to act on behalf of the defendants. However, according to the first defendant due to the insurers appointing Messrs Tang & Antau Co advocates at the last moment and further due to unforseen circumstances, interlocutory judgment was entered against the defendants.

[11] The second explanation was that the plaintiffs lawyers had tried to steal a march on the defendants by serving the interlocutory judgment personally on the defendants instead of their advocates Messrs Tang & Antau Co despite the defendants' lawyers having, by their letter of 1 April 2005 informed the plaintiffs lawyer that they (Messrs Tang & Antau Co) had been appointed to act for the defendants and to forward all correspondence to them. Accordingly, the defendants contended that their lawyers Messrs Tang & Antau Co only came to know of the interlocutory judgment on 11 November 2005 when the insurers forwarded the same to them, after which the application to set aside was immediately prepared, but the affidavit in support could only be affirmed on 5 December 2005 because the first defendant, a lorry driver, was travelling. Based on the foregoing explanation, the defendants contended that since the interlocutory judgment was never served on their advocates on record, which should have been done pursuant to O 62 r 13 of the Rules of the High Court 1980 ('RHC'), which rule would apply to the subordinate court by virtue of O 1 r 4 of the SCR (since there is no equivalent in the SCR), the 30 days had not begun to run and so their application was well within the time allowed under the rules.

[12] Before the learned sessions judge and before me as well, the plaintiff sought to counter the arguments advanced by the defendants by pointing out that the defendants were not candid in their explanation, in that, they blamed the insurers for appointing Messrs Tang & Antau Co at the last moment, but this could not be true because it is evident from a letter dated 31 March 2005 written by the insurers to Messrs Tang & Antau Co that the legal firm received the insurers' letter on 4 April 2005, which is a date well before the return date for the summons (see exh 'CYH1'

annexed to the affidavit of the first defendant affirmed on 5 December 2005 in support to the defendants' application to set aside). A

[13] In response to the point that the plaintiff had served the interlocutory judgment on the defendants personally instead of their lawyer, the plaintiff drew attention to the fact that Messrs Tang & Antau Co's letter of 1 April 2005 was exhibited as 'CYH2' to the affidavit of Chan Yam Heng affirmed on 26 January 2006 and that the letter 'CYH2' bears a reference 'EJ/CV/SC/(K)/05(295)-AXA'. According to the plaintiff the initials 'EJ' refers to Mr Edward Moal Juga the advocate having charge of the matter but who, at all material times, was not issued with a practicing certificate in the years 2004 and 2005, under s 9 of the Sarawak Advocates' Ordinance (Cap 110), and, was at all material times an undischarged bankrupt. Accordingly, it was the plaintiffs contention before the learned sessions judge that his lawyers were not obliged to comply with Messrs Tang & Antau Co's letter of 1 April 2005. It should be noted that the plaintiff's allegations about Mr Juga not possessing a practicing certificate and being a bankrupt at all relevant times, are made in paragraph three of Goh Kok Hua's affidavit in opposition No 2 affirmed on 9 February 2006. These allegations are not denied by the defendants who confirm that Mr Juga is an undischarged bankrupt. As far as his right to practice is concerned, the Registrar of the High Court, Kuching has confirmed in writing that Mr Juga was not issued a practicing certificate in 2004 or 2005 (see exh 'AG5' of Goh Kok Hua'a affidavit affirmed on 17 January 2006). The defendants tried to explain, however, that Mr Juga was not in the employ of Messrs Tang & Antau Co but of a firm known as Tang, Antau, Juga and Jarau which was taken over by Messrs Tang & Antau Co (Kuching) some time in July 2005. B C D E

[14] On the facts before her, the learned sessions judge rejected the explanation for the defendants' delay in applying to set aside the interlocutory judgment. F

[15] With regard to the defendants' explanation that Mr Edward Juga was not employed by Messrs Tang & Antau Co (Kuching), the learned sessions judge found no truth in the contention and said (at p 7 of her decision): G

> ... in my view, [this] is not true judging from the letter head of Tang & Antau Co, advocates' letters marked CYH4 (dated 22 July 2005) and CYH5 (dated 29 September 2005) which show that Edward Juga was an advocate in Tang & Antau Co advocates. Further, 'EJ' appearing in Our Reference of the said two letters presumably refers to Edward Juga). H

[16] With regard to the defendants' contention that the plaintiffs lawyer had tried to steal a march on the defendants by serving the interlocutory judgment on them instead of their advocate as requested, the learned sessions judge rejected this argument and said (at p 9 of her decision): I

> I fully agree with the plaintiff that Mr Edward Juga, being an undischarged bankrupt and not being issued with a practicing certificate, ought not to have acted for the defendants. Any dealings with him would be void ab initio. Hence, the plaintiffs solicitors are justified not to deal with him.

Reading from para three of the affidavit in opposition No 2 affirmed by Goh Kok Hua affirmed on 9 February 2006, it appears the reasons why the plaintiff solicitors did not response to CYH-1 was not only because Mr Edward Juga did not have a practicing certificate, but also because he was an undischarged bankrupt. I therefore do not agree that the plaintiff solicitors were trying to steal a march on the defendants' by not serving the interlocutory judgement on the defendants even before they have received the registrar's letter ie AG-5.

It is a cardinal principle of law that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion (see *Kho Cheng Wah v Sungai Way Leasing* [1996] 1 MLJ 223).

On my part, I find a delay of six months is substantial delay in respect of which, I regret to say, the defendants have not advanced a satisfactory explanation.

[17] Pausing here for one moment, I fully agree with the findings arrived at by the learned sessions judge and her reasons for rejecting the explanation offered by the defendants. On my part, with regard to the first explanation offered by the defendants, I find a distinct lack of candour on the defendants' part in trying to blame the insurers for appointing the legal firm of Messrs Tang & Antau Co at the last moment. There can be no truth in this allegation for two reasons: First, Messrs Tang & Antau Co received the insurers' instructions on 4 April 2005 which was four days before the return date fixed for the hearing of the summons; and secondly, no one from Messrs Tang & Antau Co has come forward to say the firm was instructed too late to be able to appear on 8 April 2005 or why they could not do so.

[18] The defendants' further lack of candour can be seen from their assertion that the interlocutory judgment was entered against them due to unforseen circumstances. The defendants are not being forthright with the court nor of any assistance to the court when they refuse to inform the court what those unforseen circumstances were. In a case such as this where the defendants are relying on the court to exercise discretion in their favour, they cannot expect a favourable exercise of discretion if they themselves are not candid with the court or are not willing to place all relevant material before the court to assist the court in the exercise of its discretion.

[19] With regard to the second explanation, quite apart from agreeing with the learned sessions judge's reasons for rejecting this explanation, Mr Charles Antau who appeared to argue the appeal on behalf of the defendants very properly, on being asked by the court, admitted that the letter of 1 April 2005 ('CYH2') was signed by Mr Edward Juga, a person who at that material time was not authorised to practice as an advocate.

[20] During submissions before me counsel for the defendants, relying on O 62 r 13 of the RHC, contended that the 30 days period under O 29 r 14 of the SCR

had not even begun to run as the interlocutory judgment had not been served on the defendants' advocates. With all respect, I do not think O 62 r 13 is of any assistance to the defendants here nor has it any application to the facts of this case. Order 62 r 13 is meant to apply in a situation where a party has either sued or appeared in person and then appoints a solicitor to act for him and gives notice to the opposite party of such fact, which is not the case here. This is made plain from the opening words of O 62 r 13 which states very clearly that: Where a party after having sued or appeared in person has given notice in writing to the opposite party. The defendants here, never having appeared in person cannot rely on this rule. Accordingly, the service of the interlocutory judgment personally on the defendants was good and effective to inform them of the judgment obtained against them and any application to set aside such judgment would have to be applied for within the time prescribed by O 29 r 14 of the SCR, unless extended by the court, neither of which was done in this case.

[21] In support of their arguments based on O 62 r 13 of the RHC, the defendants also referred me to the decision in *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 239 but I do not find that case of any assistance to the defendants here. That case is clearly distinguishable on its facts. In the first place that case did not concern O 62 r 13. Secondly, in that case, unlike here, before the filing of the suit in which the judgment in default was obtained, the plaintiff and defendant were already involved in proceedings to remove a caveat concerning the same piece of land, which was the subject matter of the suit, and in the caveat proceedings both parties were represented by solicitors. The plaintiff there, despite being aware that the defendant was represented by solicitors and that the caveat proceedings were on foot, proceeded to serve the defendant personally. In those circumstances, it was held that the plaintiff had served the defendant personally in order to steal a march on him which, the learned sessions judge found, was not the case here.

[22] However, despite her finding that the defendants had not offered an acceptable explanation for their delay in applying to set aside the interlocutory judgment within 30 days of the service of the same on them, the learned sessions judge still went on to consider the merits of the application and set aside the interlocutory judgment for the sole reason that the defendants had a defence on the merits.

[23] I find the learned sessions judge had erred in doing so. Once the learned sessions judge had arrived at a finding that the defendants' application was out of time and no acceptable explanation had been given for the delay in making the application, it was not open to her to consider the merits of the application. Authority for this proposition is the decision of the Court of Appeal in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* [2003] 4 MLJ 647, which was a case concerning an application to set aside a judgment in default of appearance entered against the appellants there under the RHC, but which was made outside the 30 days allowed by O 42 r 13 of the RHC (which is the equivalent of O 29 r 14 of the SCR). It was held by the Court of Appeal (per Nik Hashim JCA) at p 651 that:

> From the record, the JID was not irregular in any way. However, the appellants' application did not comply with O 42 r 13 of the Rules of the High Court 1980 which requires that

A a party intending to set aside a judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the judgment by him. In the present case the first and third appellants were two months outside the time allowed whereas the second appellant was seven months. Further, there was no explanation whatsoever from the appellants for their delay in approaching the court and that they had not prayed for extension of time to make their applications. In these circumstances, B there was clearly no need for the merits of the appellants' application to be considered and in fact they should be dismissed in limine (see *Koperasi Bella Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209; *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 ML J 223;*Abdul Latif bin Mohamed Ibrahim v International Factors Leasing Pte Ltd* [2001] 2 MLJ 369).

C

[24] Despite the clear pronouncement of the Court of Appeal on the matter it was submitted on behalf of the defendants that delay alone cannot justify the dismissal of an application to set aside a judgment in default and that the court must consider the merits of the application. I do not agree. In the light of the requirement in O 29 r 14 of the SCR which was introduced into the rules in 1993, that the application D to set aside must be made within 30 days, it would be wrong for the court to ignore that rule and go straight into the merits of an application. Further the submission is squarely against the decision in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd*. Such an approach would also be inconsistent with that part of the decision in *Khor Cheng Wah v Sungei Way Leasing Sdn Bhd* where the Court of Appeal said (per Gopal Sri Ram E JCA) at p 229 that:

> Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.

F **[25]** To me, what was said there is applicable with even more force in a case such as this, where the defendants' right to set aside the interlocutory judgment is not exercisable *ex debito justitiae*, and the learned sessions judge had rejected their explanation for the delay. On the facts and circumstances disclosed to the court, clearly the defendants here were indolent. I use the word indolent advisedly because while I am aware that in *Khor Cheng Wah*'s case it was said that a court will not, G whenever feasibly, allow a client to suffer for the negligence of his solicitor, the Court of Appeal did go on to say that there are limits to what may be done in the interests of justice which, as the Court of Appeal went on to point out, is not only for a defaulting defendant: it is for the plaintiff as well. An examination of the facts here shows that after informing the insurers upon their being served, the defendants did H not say that they did anything further to communicate with their insurers or their lawyers to discover the state of the litigation against them or even what they did after being served with the interlocutory judgment. In the absence of any such information or explanation, it would be wrong to visit the consequences of the defendants' indifference on the plaintiffs head.

I **[26]** Counsel for the defendants also referred me to several case authorities in support of his submission that notwithstanding delay, the court must consider the merits of the application. I was referred to three High Court decisions, namely, *OCBC Bank (M) Bhd & Anor v Livison Sdn Bhd & Ors* [2001] 5 MLJ 129; *Malayan United Bank Bhd v Mohamed Salleh bin Mohamed Yusoff & Ors* [1988] 3 MLJ 165;

and *C Paul D'Cruz v Chow Tai You & Sons Sdn Bhd* [1999] 1 MLJ 51. With all respect, not only do I prefer the views expressed on the point by the Court of Appeal in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd*, I am also bound by that decision.

[27] I was also referred to *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 which is a decision of the then Supreme Court but I would point out that that case was decided before the Subordinate Courts Rules were amended in 1993 by PU(A) 1 93/93, to including O 29 r 14. Accordingly, in my view, the decision in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* is still the decision I should follow on the particular point. For all the above reasons, I allow the appeal with costs.

Appeal allowed with costs.

Reported by Sally Kee